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Attorney for Appellee
Shannon Falk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE:	)	No. CV 08-01109 VRW
	)	on appeal from U.S. Bankruptcy
	)	Court
SHANNON M. FALK,)	
	)	BK No. 07-10865
<u>Debtor.</u>)	
	)	Chapter 11
SHANNON FALK,)	
	)	A.P. No. 07-1080
Plaintiff/Appellee,)	
)	
v.)	
	)	MOTION TO AUGMENT RECORD
MICHAEL FALK,	)	ON APPEAL; DECLARATION OF
	)	DAVID N. CHANDLER; MEMORANDUM
<u>Defendant/Appellant.</u>	)	<u>OF POINTS AND AUTHORITIES</u>

Shannon Falk, Appellee, by and through counsel hereby moves the above entitled Court for an Order Augmenting the Record designated on appeal.

Said Motion is made and based on the grounds that the Answer filed in the U.S. Bankruptcy Court by the Appellant was not designated a part of the record on appeal as it was not relevant to the Motion for Summary Judgment or Opposition considered by the Bankruptcy Court or the issue designated by the Appellant. The Appellant raises matters for the first time on appeal which were

1 waived by the filing of said Answer. The Answer is pertinent to the
2 matters raised for the first time before this Court.

3 Said Motion is made and based on the within Motion, the appended
4 Declaration of David N. Chandler, the Memorandum of Points and
5 Authorities and the record designated and filed herein.

6 Dated: 7/16/08 DAVID N. CHANDLER, p.c.

7
8 By: /s/ David N. Chandler
9 DAVID N. CHANDLER,
Attorney for Appellee

10 DECLARATION OF DAVID N. CHANDLER

11 I, David N. Chandler, declare and say:

12 1. That if called as a witness, I am competent to testify to
13 the within matters from my own knowledge.

14 2. I am the attorney for the Appellee in the Adversary
15 Proceeding in which the Judgment was entered from which Appellant
16 appeals.

17 3. I have read the Appellant's Opening Brief. Appellant
18 raises for the first time on appeal that the Property Agreement was
19 entered into as a result of undue influence, duress and/or breach of
20 fiduciary duty.

21 4. The affirmative defenses were not plead in the Answer and
22 were not presented or argued in the opposition to the Motion for
23 Summary Judgment or in the Counter Motion for Summary Judgment.

24 5. The Answer sets forth seven (7) separate affirmative
25 defenses. None plead are based upon undue influence, duress, fraud
26 or breach of fiduciary duty. Appellee argues that such defenses are
27 waived by failure to plead.

28 6. Appellee had no basis to designate the Answer as part of

1 the record on appeal, but now requests leave to augment the record
2 based upon the arguments contained for the first time in the Opening
3 Brief.

4 7. A true and correct copy of the Answer filed in the case
5 below is attached hereto as Exhibit A.

6 Executed under penalty of perjury this 16th day of July, 2008 at
7 Santa Rosa, California.

8
9 /s/David N. Chandler
David N. Chandler

10 MEMORANDUM OF POINTS AND AUTHORITIES

11 Appellee submits the following Memorandum of Points and
12 Authorities in support of the within Motion:

13 1. This Court may authorize augmentation of the record on
14 appeal. FRAP Rule 10(e)(2).

15 2. It is within the discretion of this Court to consider
16 matters raised for the first time on appeal. Appellate courts have
17 discretion to consider issues initially raised on appeal. In re Wind
18 Power Systems, Inc., 841 F.2d 288, 290 n.1 (9th Cir. 1988).

19 3. Review of the Answer filed in the Bankruptcy Court is a
20 factor in the exercise of discretion to consider the issue for the
21 first time on appeal or whether such an issue exists. Appellee
22 contends in the appeal that affirmative defenses are required to be
23 pled and a failure to plead constitutes a waiver. The affirmative
24 defenses which the Appellant contends were not considered were not
25 raised by the Answer or at any other time in the Bankruptcy Court.

26 WHEREFORE, it is respectfully submitted that this Court
27 authorize augmentation of the record on appeal to include the Answer
28 filed by the Appellant, and for such other and further relief as the

1 Court deems just and proper.

2 Dated: 7/16/08

DAVID N. CHANDLER, p.c.

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By: /s/ David N. Chandler

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DAVID N. CHANDLER,
Attorney for Appellee

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Attorney for Defendant

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re:

Case No. 07-10865

SHANNON FALK,

Chapter 11

A.P. No. 07-1080

Debtor.

SHANNON FALK,

ANSWER TO COMPLAINT FOR DECLARATORY
 RELIEF, TURNOVER OF PROPERTY OF THE
 ESTATE, INJUNCTIVE RELIEF; PROOF OF
 SERVICE BY MAIL

Plaintiff,

vs.

MICHAEL FALK,

Defendant.

MICHAEL T. FALK, defendant herein, by and through Craig A. Burnett, Esq., his attorney of record
 in this action, answer the complaint of SHANNON FALK (hereinafter "Plaintiff"), as follows:

1. Defendant admits the allegations contained in Paragraph one of said complaint.

2. Defendant admits the allegations contained in Paragraph two of said complaint.

3. Defendant admits the allegations contained in Paragraph three of said complaint insofar as the
 Michael T. and Shannon M. Falk Marital Trust was established, the exact date of which is unknown to
 defendant at this time. Except as so expressly admitted, defendant denies the remaining allegations
 contained in said paragraph based on lack of information and/or belief.

4. Defendant admits the allegations contained in Paragraph four of said complaint insofar as a
 transfer of the New York Limited Partnerships interest was made for estate planning purposes only, and for
 no other reason. Except as so expressly admitted, defendant denies the remaining allegations contained in
 said paragraph based on lack of information and/or belief.

1 5. Defendant admits the allegations contained in Paragraph five of said complaint.

2 6. Defendant admits the allegations contained in Paragraph six of said complaint.

3 7. Defendant denies each and every allegation contained in Paragraph seven of said complaint.

4 8. Defendant denies each and every allegation contained in Paragraph eight of said complaint.

5 9. Defendant admits the allegations contained in Paragraph nine of said complaint.

6
7 10. As to Paragraph ten of said complaint, defendant admits that a portion of the distributions from
8 the New York Limited Partnerships interest were used to pay community debts and obligations. Except as
9 so expressly admitted, defendant denies the remaining allegations contained in said paragraph based on lack
10 of information and/or belief.

11 11. Defendant denies the allegations contained in Paragraph 11 of said complaint insofar as the New
12 York Partnership interests are the sole and separate property of defendant, and therefore no such
13 determination to the contrary is required.

14 12. Defendant denies each and every allegation contained in Paragraph twelve of said complaint.

15 13. Defendant denies each and every allegation contained in Paragraph thirteen of said complaint.

16 14. Defendant denies each and every allegation contained in Paragraph fourteen of said complaint.

17 15. Defendant denies each and every allegation contained in Paragraph fifteen of said complaint.

18 16. Defendant denies each and every allegation contained in Paragraph sixteen of said complaint.

19
20 AFFIRMATIVE DEFENSES

21 17. The complaint fails to state a cause of action upon which relief can be granted.

22 18. The complaint fails to satisfy the statutory requirements for transmutation under California
23 Family Code Section 852 or any other subsection of Sections 850 through 853.

24 19. The New York Partnership agreements require the performance of specific conditions to effect
25 a transfer of the interests, which if not met, make any purported transfer void on its face. These conditions
26 were not met pursuant to the terms of the partnership agreements.

27 20. Other than transfer the New York Partnership interests into the marital trust for estate planning
28

1 purposes, no further statement, act or writing was made to change the ownership of said asset. Said asset
2 was always referred to in all writings, including but not limited to all income tax returns, K-1 Schedules,
3 and all other documents reflecting ownership of said interests, both before and after June 2, 2004, as the
4 sole and separate property of defendant. Even plaintiff's Exhibits A and B make express reference to the
5 fact that any separate property transferred into the marital trust retain its character as such after its transfer
6 or withdrawal, see plaintiff's Exhibit A, paragraph 3. Plaintiff's Exhibit B specifically states that "any
7 property, or interest in property, owned by either [party] before [the] marriage or acquired by either [party]
8 at any time by gift or inheritance and that is registered or otherwise held in either . . . name alone or that is
9 designated as separate property under [the] Trust is the separate property of that spouse."

10 21. Plaintiff is barred by the doctrine of estoppel from the recovery she seeks in said complaint.

11 22. Plaintiff has waived her right to any recovery she seeks in said complaint.

12 23. Plaintiff's position in this complaint is not substantially justified, and the defendant is entitled
13 to the costs of, and a reasonable attorney's fee for this proceeding.

14 WHEREFORE, Defendant requests:

- 15 1. That said complaint be dismissed;
16 2. That plaintiff take nothing by complaint;
17 3. That Defendants be awarded reasonable attorney's fees and costs incurred herein; and
18 4. For such other and further relief as the Court deems just.
19

20 Dated: 11/13/07

21 /S/ Craig A. Burnett

22 Craig A. Burnett, Esq., Attorney for Defendant
23 Calif. State Bar No. 118907
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25
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PROOF OF SERVICE BY MAIL

I declare that: I am employed in the County of Sonoma. I am over the age of eighteen years and not a party to the within action; my business address is 537 Fourth Street, Suite A, Santa Rosa, California 95401.

On **November 13, 2007**, I served the within:

ANSWER TO COMPLAINT

in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Santa Rosa, California, addressed as follows:

David N. Chandler, Esq.
1747 Fourth Street
Santa Rosa, CA 95404

U.S. Trustee
235 Pine Street, Suite 700
San Francisco, CA 94104

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **November 13, 2007**, at Santa Rosa, California.

/S/ Kateri T. Turner

Kateri T. Turner